

2. An order from the U.S. District Court for the District of Colorado sanctioning the Defendant and its counsel for failing to preserve certain text messages and then misrepresenting to the court that the messages were being produced.

In *ORP Surgical, LLP v. Howmedica Osteonics Corp.*, No. 1:20-cv-01450-RBJ, 2022 WL 1468115 (D. Colo. May 10, 2022), Senior U.S. District Judge R. Brooke Jackson sanctioned the Defendant and its counsel for failing to preserve certain text messages and then representing to the court that the messages were being produced when not all of them were.

This case involved claims and counterclaims for breach of contract and other causes of action related to two contracts under which Plaintiff sold Defendant's medical products on commission. Because of the volume and antagonistic nature of the discovery disputes that occurred, the court appointed a special master to assist in managing the discovery process. Among other discovery issues addressed by the special master was whether Defendant failed to preserve text messages from its vice president in charge of the relationship, Adam Jacobs, and one of its sales managers, Michael Bonessi.

In one of his reports, the special master found that Defendant did not fulfill its duty to preserve and protect Jacobs and Bonessi's text messages, including text messages with certain of Plaintiff's sales representatives. *Id.* at *12. He recommended spoliation sanctions including that a negative inference be drawn, but he also recommended that the sanctions be reduced if the relevant text messages were recovered from other phones. At that time, and based on Defendant's counsel's representation that all texts between the sales representatives and Jacobs and/or Bonessi were being produced, Judge Jackson declined to impose sanctions.

Plaintiffs later claimed that despite Defendant's representation, it did not produce all of the text messages between the sales representatives and Jacobs and Bonessi because counsel had (1) stripped the messages of all images and attachments, (2) not produced text messages from another of its employees, and (3) left a suspicious gap in a message chain involving Jacobs. *Id.* at *13. Defendant denied that it failed to produce any text messages and claimed that any late production resulted from technical difficulties.

After considering all the evidence and arguments, Judge Jackson found that Defendant failed to meet some of its preservation obligations and that Defendant's counsel turned the case "sour with nasty litigation tactics" and "played fast and loose" with discovery obligations. He agreed with the special master that Defendant's failure to preserve text messages was either willful misconduct or gross negligence. Judge Jackson also found that the representation by Defendant's counsel that all texts

between the sales representatives and Jacobs and/or Bonessi were being produced was untrue.

Judge Jackson next addressed the appropriate sanction for Defendant's and counsel's conduct. *Id.* at *14. He agreed with the special master's observation that the sanctions "should have teeth" but disagreed regarding the import of that observation. The special master recommended presuming a pivotal fact at trial, admittedly "a severe sanction." Judge Jackson noted that obligating Defendant to reimburse two-thirds of Plaintiff's special master costs would be insufficient, as would requiring Defendant to reimburse Plaintiffs' attorneys fees (because the parties' contract already requires such reimbursement). Judge Jackson noted that another potential sanction, trebling the award of attorney's fees, was excessive in the context that Defendant was already required to pay Plaintiffs' attorney's fees.

Ultimately, Judge Jackson ordered Defendant and its counsel to reimburse Plaintiff for the full amount of Plaintiffs' share of the special master's fees and costs, with Defendant paying half of the reimbursement for its failure to preserve text messages, and Defendant's counsel paying the other half for its misconduct during the discovery process. The court also admonished counsel because although the parties were entitled to zealous advocacy from their outside counsel and from their inside corporate attorneys, "zealous advocacy does not justify abusive conduct or hiding the ball."